### Office of Chief Counsel Internal Revenue Service

# memorandum

CC:LM:CTM:LN:TL-N-5533-00 JAMoon

date:

Chief, Examination Division, Southern California District Attention: , CEP Case Manager , CEP Team Coordinator

, Santa Ana

Audie Sturla, Group Manager, Employment Tax Tony Lloren, Employment Tax Specialist

FE: 1417, Santa Ana

from: June Y. Bass, Associate Area Counsel, LMSB

Joyce M. Marr, Attorney Jenny A. Moon, Attorney

subject: Request for Pre-Review of Non-docketed Significant Advice

> Taxpayers: (1) (EIN (2)

Executing Forms SS-10 and Forms 4016 for years prior to Issue:

Statute of Limitations:

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103. THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION, APPEALS, OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS STATEMENT. THIS ADVICE MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES.

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The purpose of this memorandum is to advise you in securing Forms SS-10, "Consent to Extend the Time to Assess Employment Taxes," and Forms 4016, "Consent Fixing Period of Limitation Upon Assessment of Employment or Miscellaneous Excise Taxes Against a Transferee," with respect to the following two entities:

1. (EIN ), and (EIN EIN EIN

Given the imminent expiration of the statute of limitations, we have assumed in rendering this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through.

Furthermore, our advice herein is applicable for tax years prior to (but not including) the year.

#### **ISSUES**

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent, Form 4016, should be obtained:

1. (EIN ), and (EIN )

#### CONCLUSIONS

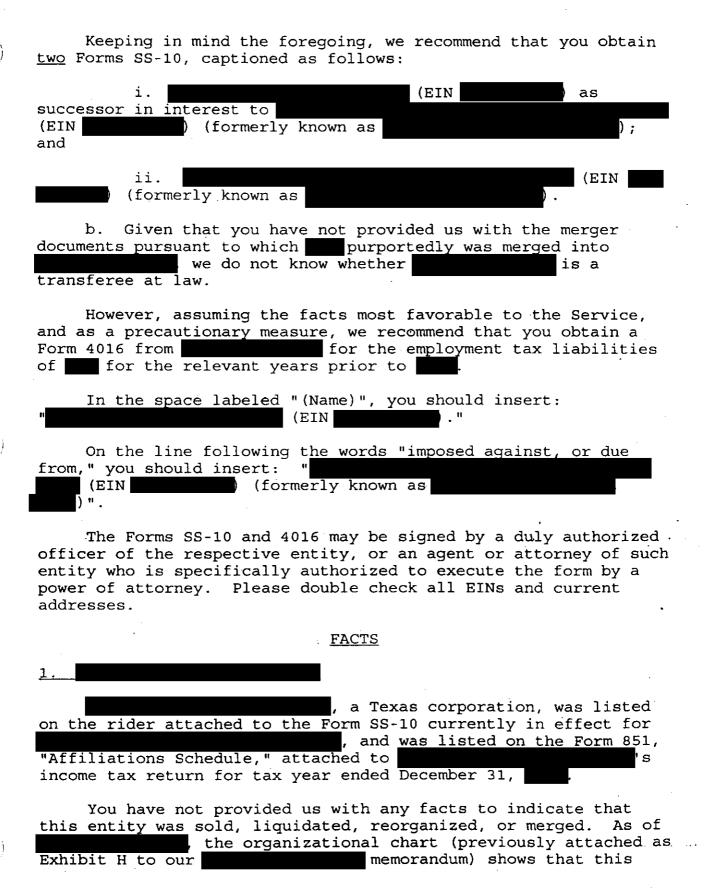
## 1.

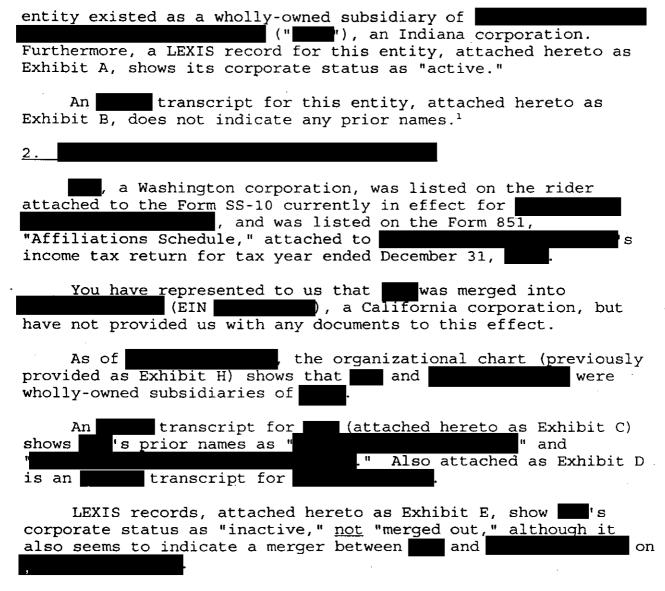
- a. Since you have not provided us with any facts to indicate that this entity was sold, liquidated, reorganized, or merged, we assume no such change, in which case you should secure a Form SS-10 from this entity, captioned as follows: "

  (EIN )."
- b. Assuming the foregoing, there is no "transferee" from whom a Form 4016 could be obtained.

## 2.

a. We note that our advice with respect to this entity is based on incomplete facts (primarily relying upon LEXIS records and transcripts) and significant assumptions regarding the purported merger of this entity into (""). If you determine that any of our assumptions are incorrect, or that there are additional facts, you should not rely on our advice.





#### DISCUSSION

#### I. Generally

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891,

Even though LEXIS shows multiple "assumed names" for this entity, because these names are not reflected on the transcript, we recommend that you do not take these names into account in the captioning of the taxpayer's name, unless you know for certain that the taxpayer is using the assumed names.

892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

#### II. Application of the Law

#### Α.

Because you have not presented us with facts to the contrary, we assume that this entity currently exists and was not subject to any mergers, liquidations, dissolutions, reorganizations, or sale. Consequently, you should secure a Form SS-10 captioned as, " (EIN ."

Furthermore, assuming the foregoing, there is no "transferee" from whom a Form 4016 could be obtained.

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### 1. Form SS-10

Without reviewing the documents pursuant to which purportedly merged into purpose, it is difficult to advise you on the proper captioning of the taxpayer's name. Our advice herein is based on incomplete facts, from reviewing transcripts and LEXIS records.

However, in the event that was not merged, we recommend that you obtain a Form SS-10 from captioned as follows:

(EIN )

(Formerly known as

#### 2. Form 4016

Without reviewing the merger documents, we can not determine whether is a transferee at law. However, assuming the facts most favorable to the Service, and as a precautionary measure, we recommend that you obtain a Form 4016 from for the employment tax liabilities of for the relevant years prior to

If you have any questions, please contact Jenny A. Moon at 949-360-3431 or Joyce M. Marr at 949-360-2688.

#### Attachments:

Exhibit A: A LEXIS record for

Exhibit B: An transcript for

Exhibit C: An transcript for ......

Exhibit E: LEXIS records for